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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

10 MEG PAULSEN,

11 Plaintiff,

12 v.

13 PS BUSINESS PARKS, LP,

14 Defendant.

CASE NO. C10-1031 MJP

ORDER DENYING THE PARTIES'
CROSS-MOTIONS FOR SUMMARY
JUDGMENT

15 This comes before the court on the parties' cross-motions for summary judgment (Dkt.
16 Nos. 18 and 19.) Having reviewed the motions, the responses (Dkt. Nos. 23 and 26), the replies
17 (Dkt. Nos. 25 and 29), and all related filings, the Court DENIES Plaintiff's motion for summary
18 judgment and DENIES Defendant's motion for summary judgment.

19 **Background**

20 Plaintiff Meg Paulsen ("Paulsen") was born with spina bifida and is wheelchair-bound.
21 (Paulsen Decl., Dkt. No. 18, Ex. A.) Defendant PS Business Parks, LP is the owner of the
22 Overlake Business Center ("OBC"), which consists of 27 buildings across a North and South
23 campus. (Kidwell Decl., Dkt. No. 20, Ex. 1.)
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Paulsen is suing Defendant for failure to comply with the Americans with Disabilities Act (“ADA”) accessibility requirements. In June 2010, Paulsen visited OBC but confronted various barriers to access, including steep curb ramps, narrow parking spaces, insufficient number of accessible parking spaces, and inaccessible routes in between buildings. (Paulsen Decl., Dkt. No. 18, Ex. A.)

OBC was built between 1974 and 1978. (Kidwell Decl., Dkt. No. 20, Ex. 1.) Since its original construction, only the interiors of OBC have required building permits. (*Id.* at 3.) Of the 27 buildings, 20 of the buildings have at least one or more tenants whose businesses are open to the public. The remaining 7 have no business open to the general public. (Petersen Decl., Dkt. No. 24, ¶¶ 4, 7-9.) In her declaration, Paulsen does not identify which of the 27 buildings she attempted to enter in June 2010. (Paulsen Decl., Dkt. No. 18, Ex. A ¶ 3.)

Discussion

Both Plaintiff and Defendant seek summary judgment regarding Plaintiff’s ADA and state law claim under the Washington Law Against Discrimination (“WLAD”). The Court finds factual disputes exist, precluding either parties’ request for summary judgment.

1. Standard

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that there are no genuine issues of material fact for trial and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). Material facts are those “that might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The underlying facts are viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The party moving

1 for summary judgment has the burden to show initially the absence of a genuine issue
2 concerning any material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159 (1970). Once the
3 moving party has met its initial burden, the burden shifts to the nonmoving party to establish the
4 existence of an issue of fact regarding an element essential to that party's case, and on which that
5 party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24
6 (1986).

7 2. Defendant's Motion for Summary Judgment

8 a. ADA Claims

9 Defendant argues (1) OBC is not subject to the ADA and (2) removal of architectural
10 barriers is not "readily achievable." Neither argument warrants summary judgment.

11 i. Existing facilities subject to the ADA

12 Defendant argues (1) OBC is not subject to the ADA because it was constructed before
13 the ADA's effective date in 1993 and no alterations have occurred after 1992.

14 Under the ADA, "[n]o individual shall be discriminated against on the basis of disability
15 in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or
16 accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). The ADA's
17 accessibility requirements, however, differ depending on the dates that facilities were
18 constructed or altered. New facilities, i.e., buildings built after January 26, 1993, must be
19 "readily accessible to and usable by" disabled individuals. 42 U.S.C. § 12183(a)(3); 28 C.F.R. §
20 36.406(a). For facilities built before that time and altered in certain ways after January 26, 1992,
21 the altered portion and—to a certain extent--the path of travel to the altered portion, must comply
22 with separate regulatory standards. 28 C.F.R. §§ 36.402(b)(2); 36.406(a). For existing facilities,
23 i.e., buildings built prior to January 26, 1993 and not altered since January 26, 1992, architectural
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1 barriers must be removed when it is “readily achievable” to do so. 42 U.S.C. §
2 12182(b)(2)(A)(iv).

3 Here, OBC is subject to the ADA’s regulations regarding existing facilities because it
4 was built in the 1970s and has not been altered since 1992. While Defendant argues the OBC is
5 exempt from the ADA altogether, Defendant’s argument cites no legal authority and refers only
6 to the declaration of its own expert, Charles Kidwell. (Dkt. No. 20, Kidwell Decl., ¶ 5.)
7 Defendant’s argument is particularly unavailing given that the ADA specifically imposes
8 accessibility requirements for facilities existing as of the ADA’s effective date. See 42 U.S.C. §
9 12181(b)(2)(A)(iv); 28 C.F.R. § 36.304. The fact that the ADA also imposes separate
10 accessibility requirements on new construction and altered facilities does not exempt the OBC
11 from complying with standards regarding existing facilities. Compare 28 C.F.R. § 36.401
12 (standards for new construction) and 28 C.F.R. § 36.402 (standards for alterations) with 28
13 C.F.R. § 36.304 (standards for existing facilities).

14 Since the ADA regulates existing facilities, the Court finds OBC subject to the ADA
15 regardless of whether standards regarding new construction and altered facilities are applicable.

16 ii. “Readily Achievable”

17 Alternatively, Defendant argues removal of architectural barriers is not “readily
18 achievable.” The Court finds factual disputes exist, precluding summary judgment.

19 Under the ADA, plaintiff bears the initial burden of showing (1) the existing facility
20 presents a prohibited architectural barrier and (2) removal of the barrier is readily achievable.
21 Colorado Cross Disability Coalition v. Hermanson Family Ltd. Partnership I, 264 F.3d 999, 1002
22 (10th Cir. 2001). If Plaintiff does so, Defendant then bears the ultimate burden of persuasion that
23 barrier removal is not readily achievable. Id. at 1003; cf. Molski v. Foley Estates Vineyard and
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1 | Winery, LLC, 531 F.3d 1043 (9th Cir. 2008)(providing a different burden shifting standard for
2 | ADA suits involving historical buildings). As expected, the “readily achievable” standard is less
3 | stringent than the standard imposed upon owners of new construction, who must show
4 | “structural impracticability” in order to avoid violating the ADA. See 42 U.S.C. § 12183(a)(1);
5 | see also U.S. Department of Justice, Title III Technical Assistance Manual: Covering Public
6 | Accommodations and Commercial Facilities, 31 (November 1993). The ADA defines “readily
7 | achievable” as “easily accomplishable and able to be carried out without much difficulty or
8 | expense.” 42 U.S.C. 12181(9). Factors to consider include the nature and cost of the action
9 | needed, the overall financial resources of the facility, the overall financial resources of the
10 | covered entity, and the type of operation of the covered entity. Id.

11 | Defendant effectively makes three arguments as to why Paulsen’s complaints are not
12 | readily achievable. The Court finds all three arguments fail. First, Defendant argues the nature
13 | and cost of the actions needed are not easily accomplishable. The Court is not convinced.
14 | Among Plaintiff’s requests are that Defendant make curb cuts in sidewalks and entrances, create
15 | accessible parking spaces, and replace door hardware. Even if some of Plaintiff’s complaints are
16 | not feasible, these complaints certainly are as they are listed under ADA regulations as examples
17 | of readily achievable actions. Cf. 28 C.F.R. § 36.304 (listing ramps, handrails and door
18 | hardware as readily achievable steps to remove barriers).

19 | In addition, Defendant’s own expert observed several non-compliant entry doors at OBC.
20 | (Kidwell Decl., Dkt. No. 20-1, at 4.) Plaintiff estimates non-compliant door handles in Building
21 | 3 could be replaced for as little as \$125. (Mason Decl., Dkt. No. 18, Ex. C1-4 at 4, 16.) While
22 | Defendant argues Plaintiff’s expert report does not breakdown the cost of materials and labor,
23 | Plaintiff need not itemize every bolt required to ensure a door is ADA-compliant. To the extent
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1 Defendant relies on its expert's statement that barrier removal is not "easily accomplishable," a
2 conclusory statement regarding Plaintiff's complaints in general is not persuasive. Even though
3 each building has numerous entrances and completion of all of Plaintiff's requests would require
4 several hundred lineal feet of sidewalk and installation of ramps and railings, Defendant is not
5 required to remove all architectural barriers—only those that are "readily achievable." Since
6 Plaintiff's cost estimates are sufficiently detailed and based on industry publications, the Court
7 finds the nature and cost of at least some of Plaintiff's requested actions are readily achievable.
8 Cf. RS Means/Reed Construction Data, Building Construction Cost Data, 69th Annual Edition
9 2011.

10 Second, Defendant argues its overall financial resources preclude it from removing the
11 barriers. The Court disagrees. Paulsen provides some evidence that Defendant has the financial
12 resources to remove some simple barriers. Based on Defendant's website, Defendant is a
13 partnership under PS Business Parks, Inc., a publicly-traded real estate company that operates
14 commercial spaces in eight different states. (Dkt. No. 18-8, Ex. E.) While financial data
15 downloaded from Defendant's website will likely not be enough at trial, the Court finds a factual
16 dispute exists, precluding summary judgment. Since it appears Defendant may have the
17 financial resources to remove the barriers, Plaintiff has shown a factual dispute exists as to
18 whether some of the barriers to removal are readily achievable.

19 Third, Defendant argues OBC's existence is uncertain given proposed land-use actions.
20 The Court finds this is Defendant's weakest argument. The only evidence Defendant provides as
21 to Redmond's possible land-use action is their own expert discussing potential plans by the
22 Washington Transportation Department. (Dkt. No. 20-3, Kidwell Decl., Ex. 1 at 22.) Defendant
23 submits nothing else suggesting OBC's conditional use permit expires in January 2012 or the
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1 actual scope of the Transportation Department’s plans. The Court will not base a decision on
2 land-use actions that may or may not occur—especially when Defendant fails to submit any
3 evidence of the land-use actions other than an expert paid to provide a report on their behalf.

4 In sum, Plaintiff meets her burden under Colorado Cross and has demonstrated a factual
5 dispute exists as to whether removing barriers is “readily achievable.” Since at least some of
6 Paulsen’s complaints are considered readily achievable under the ADA’s regulations, the Court
7 DENIES Defendant’s motion for summary judgment on Plaintiff’s ADA claim.

8 b. WLAD claims

9 Defendant argues RCW 49.60.215 does not impose liability when the structural barriers
10 to accessibility were lawful when constructed. The Court disagrees.

11 Under Washington’s Law Against Discrimination (“WLAD”), it is unlawful to exclude a
12 disabled person from a place of public accommodation. RCW 49.60.215. While WLAD does
13 not require a facility undergo structural changes to ensure accessibility, WLAD’s exemption
14 “does not relieve the operator of a place of public accommodation of the duty to make reasonable
15 accommodation[s].” WAC 162-26-100(2). To determine whether a possible accommodation is
16 “reasonable” or not depends on the cost of making the accommodation, the size of the place of
17 accommodation, the availability of staff to make the accommodation, the importance of the
18 service to the person with a disability, and other factors bearing on reasonableness in the
19 particular situation. WAC 162-26-080.

20 The Court finds the WLAD analysis mirrors the discussion regarding which barrier
21 removal actions are “readily achievable.” See MacSuga v. County of Spokane, 97 Wash.App.
22 435, 443 (1999)(using federal ADA cases as guidance in interpreting the WLAD). Defendant
23 need not make structural changes to OBC but there is an on-going duty to make reasonable
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1 accommodations. Since many of Plaintiffs complaints are straightforward, including changes to
2 door hardware and other minor fixes, the Court finds Defendant's request for summary judgment
3 fails. While Defendant argues WLAD cannot be retroactively applied, Defendant's argument is
4 misplaced. Even if Defendant is not required to bring OBC up to current building codes, OBC
5 has a present-day duty to make reasonable accommodations.

6 Since a factual dispute exists as to which possible accommodations under WLAD are
7 reasonable, the Court DENIES Defendant's motion for summary judgment.

8 3. Plaintiff's Motion for Summary Judgment

9 a. ADA claims

10 Plaintiff likewise seeks summary judgment. While Plaintiff establishes a prima facie
11 case of discrimination under the ADA for OBC buildings considered places of public
12 accommodation, the Court finds summary judgment is inappropriate for the same reasons stated
13 above—a factual dispute exists as to which barrier removal actions Plaintiff complains of are
14 “readily achievable.”

15 In order to establish a prima facie case of discrimination under Title III of the ADA, a
16 plaintiff must prove that (1) she has a disability, (2) the OBC is a place of public
17 accommodation, and (3) plaintiff was denied full and equal treatment because of her disability.
18 Parr V.L. & L Drive-inn Restaurant, et. al., 96 F. Supp. 2d 1065, 1085 (D.Hawaii 2000). As
19 discussed above, when making a claim against an existing facility, a plaintiff must also show
20 barrier removal is readily achievable. Colorado Cross Disability Coalition v. Hermanson Family
21 Ltd. Partnership I, 264 F.3d 999, 1002 (10th Cir. 2001).

22 Defendant does not dispute Paulsen has spina bifida and was denied full access to OBC
23 because of her disability. The parties, however, argue whether OBC's buildings are “places of
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1 public accommodation.” Defendant’s argument has some merit. Paulsen fails to identify with
2 any specificity which OBC buildings she attempted to access. Defendant observes 7 of the OBC
3 buildings are not places of public accommodation and 19 of the OBC buildings are only mixed-
4 use facilities. The ADA only applies to places of public accommodation. When a building is
5 partially open and partially closed to the public, it is considered a mixed-use facility and “the
6 portion [of the facility] that is closed to the public is not a place of public accommodation and . .
7 . not subject to Title III of the ADA.” Doran v. 7-Eleven, Inc., 524 F.3d 1034, 1048 (9th Cir.
8 2008).

9 While the parties agree only the portions of OBC buildings open to the public are subject
10 to the ADA, Plaintiff’s report identifies barriers at buildings not open to the public. (Def’s Resp.
11 Br., Dkt. No. 23 at 7; Pltff’s Reply. Br., Dkt. No. 25 at 3.) For example, Plaintiff’s expert
12 identifies 11 barriers to access for Building 8, which consists of only commercial facilities. To
13 find in Plaintiff’s favor regarding the OBC in general would require changes to several buildings
14 and/or portions of buildings that are not open to the public.

15 The Court DENIES summary judgment because (1) a genuine issue of material fact exists
16 regarding which barrier removal actions are “readily achievable” and (2) Plaintiff fails to identify
17 which buildings are subject to the ADA as places of public accommodation.

18 b. WLAD claims

19 As discussed above, the Court finds a genuine issue of material fact exists precluding
20 summary judgment on Plaintiff’s state law claims. WLAD requires existing facilities to make
21 reasonable accommodations for disabled persons. Based on this record, it is unclear which
22 barrier removal actions may be considered “reasonable accommodations” under state law.

23 The Court DENIES summary judgment on Plaintiff’s state law claims.
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1 4. Defendant's Motion to Strike -- Surreply

2 In a surreply, Defendant argues Steven Mason's June 28, 2011 letter, which Paulsen
3 attached in her reply, is irrelevant and inadmissible. The Court agrees Mason's letter is
4 inadmissible.

5 Mason's letter was written in response to Defendant's briefing regarding summary
6 judgment. It consists of argument and not any fact Paulsen will be able to prove through
7 admissible evidence at trial. Fed. R. Civ. P. 56(e) ("A supporting or opposing affidavit must be
8 made on personal knowledge, set out facts that would be admissible in evidence, and show that
9 the affiant is competent to testify on the matters stated"); see also Norse v. City of Santa Cruz,
10 629 F.3d 966, 973 (9th Cir. 2010).


11 Because arguments made in Mason's letter are not based on his observations and consist
12 only of argument, the Court GRANTS Defendant's motion to strike the letter.

13 **Conclusion**

14 The Court DENIES the parties' cross-motions for summary judgment. A factual dispute
15 exists as to which barrier removals requested by Plaintiff are "readily achievable" under the
16 ADA or a "reasonable accommodation" under WLAD. The Court GRANTS Defendant's
17 motion to strike Mr. Mason's rebuttal letter, which was attached in Plaintiff's reply.

18 The clerk is ordered to provide copies of this order to all counsel.

19 Dated this 4th day of August, 2011.

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23 Marsha J. Pechman
24 United States District Judge